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Supreme Court, U.S.
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No. 03-1080

In The

Supreme Court Of The United States

STATE OF CONNECTICUT,
Petitioner,

v.

RUSSELL PEELER,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CONNECTICUT SUPREME COURT

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. **DOES THE SIXTH AMENDMENT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED?**

II. **CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS?**

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I. THE SIXTH AMENDMENT DOES NOT DEMAND PROOF OF A "COMPELLING NEED" FOR THE TESTIMONY OF DEFENSE COUNSEL BEFORE COUNSEL CAN BE DISQUALIFIED

The Respondent opposes certiorari on this question for two reasons: A) The case below turned on the facts, not on the heightened standard defined by the "compelling need[s]" test, and B) the Petitioner "did not claim below that the standard for calling defense counsel was too high." *Respondent's Brief in Opposition at 5.* These claims are addressed seriatim.

A. The Result Below Arose From Use Of A Heightened Standard

The Respondent argues that the "compelling need" test adopted by the Connecticut Supreme Court did not control the result. Rather he claims that the decision was fact driven. In other words, he argues that the Petitioner is really complaining about how the Connecticut Supreme Court characterized the events below.

The Respondent concedes, however, that the "compelling need" test adopted by the Court below sets a higher standard for disqualification than *Wheat v. United States, 486 U.S. 153, 164 (1988). Respondent's Brief in Opp. at 6* (Petitioner did not urge Court to "lower" threshold for calling defense counsel). With that point settled, that a debate existed about what to conclude from the facts is proof that the "compelling need" test affected the outcome.

The Respondent cites the following from the majority opinion below to stave off this Court's review: "'The dissent's argument distills to its determination that, as the state asserts, the trial court reasonably could have found that the state had a

compelling need to call Mastronardi as a witness . . For all the reasons we have already enumerated, *we simply disagree*.' Petitioner App. at A020 n 11."(Emphasis added by petitioner). *Respondent's Brief in Opposition at 5.*

Under *Wheat*, however, any disagreement should have prompted the Connecticut Supreme Court to defer to the trial court. "Viewing the situation as it did before trial . . .the fact that "[o]ther . . . courts might have reached differing or opposite conclusions with equal justification, . . .does not mean that one conclusion was `right' and the other was `wrong.'" *Wheat*. "The evaluation of the facts and circumstances of each case under this [broad discretionary] standard must be left primarily to the informed judgment of the trial court." *Id.*

Only by departing from *Wheat* and adopting the "compelling need" test was the Connecticut Supreme Court free to let its view of the facts override the trial court's pre-trial determination.

Contrary to what the Respondent claims, therefore, the test adopted by the majority below directly affected the outcome. It also created a Sixth Amendment rule that conflicts with a majority of the courts that have addressed the issue. Indeed, the Respondent acknowledged that a conflict exists on the disqualification issue because he argued as much to the Court below. *Defendant/Respondent's Brief Before the Connecticut Supreme Court pp 18-25.*[1]

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[1] The Respondent relied on *State v. Sanders, 534 S.E. 2d 696 (S.C. 2000); Respondent's Brief Before the Connecticut Supreme Court pp 20-21;* the only other jurisdiction that has raised the standard in conflict cases to requiring proof that counsel was a "necessary witness" before disqualification is justified. *State v. Sanders, 435 S.E. 2d at 698.*

Moreover, that conflict is most pronounced within the Second Circuit. As set forth in the petition, a Connecticut judge facing this issue has no effective discretion whatsoever because he or she can rarely, if ever, make the correct decision on whether to disqualify counsel. *Petition at 13-16.*

B. The Petitioner's Argument Below Addressed The First Question Presented

In what is implicitly a default argument, the Respondent posits that the Petitioner never claimed that "the standard for calling defense counsel [as a witness] is too high." Although he is correct in what he says, his point is irrelevant.

On appeal, the Connecticut Supreme Court was asked to determine whether the pre-trial decision to disqualify counsel was reversible error because it violated the Respondent's Sixth Amendment right to counsel of choice. It was not asked to decide the standards a trial court had to apply when determining whether defense counsel could be compelled to testify against his former client.

The distinction between these two issues is vital. Under *Wheat* a trial court's ruling can be upheld even if the conflict is never realized because counsel is not called as a witness. *Wheat v. United States, 486 U.S. at 163.* Conversely, if counsel is actually called to testify, the conflict has matured. At that juncture other considerations about alternative sources of evidence can be evaluated to determine if said testimony is needed.

Based on the issue presented, therefore, the state relied on precedent holding that the trial court had "broad discretionary authority" that should not be overturned even if the reviewing

court would have reached a different conclusion. *Brief of the State of Connecticut at 11.* That is the *Wheat* test.

Nevertheless, due to the possibility that the "compelling need" test might be adopted, the Petitioner was obligated to argue that, even under that test, the trial court's ruling should be upheld. In this regard, despite the Respondent's criticism of its methodology, the Petitioner had good reason to rely on *Ullmann v. State, 230 Conn. 698, 647 A. 2d 324 (1994).*[2]

First, the Petitioner argued below that the "compelling need test" was met because, in both cases, the nature of the testimony sought and the circumstances of defense counsel's involvement were almost identical. Identical cases, using identical tests, should yield identical results.[3]

Second, within its argument, the Petitioner noted that the issue raised in this case was not identical to the issue in *Ullmann.* Thus, by analogy, if the facts of *Ullmann*, satisfied the "compelling need" test then, *a fortiori,* almost identical facts should certainly satisfy the less stringent, broad discretionary rule

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[2] The Respondent supports his claim that review should be denied by referencing the following subheading from the Petitioner's brief: "'Why The Facts Of This Case Are The Same As *Ullmann.*' Brief of the State of Connecticut -Appellee, at 15." Respondent Brief at 7.

[3] In both cases, the state disclosed something to defense counsel, defense counsel had contact with the defendant, and as a result a witness was jeopardized. In *Ullmann*, the criminal defendant merely made a telephone threat to the witness. *Ullmann v. State, 230 Conn. at 700-701, 647 A. 2d at 326.* The Connecticut Supreme Court found that the compelling need test was satisfied, in part, because "[i]t is significant that the testimony related to the charge of tampering with a witness, a crime that strikes at the heart of the integrity of our criminal justice system." *Id.* The Petitioner thought it reasonable to infer that if threatening a witness was "significant" in the equation, then murdering two witnesses would be more compelling.

to be applied to disqualification cases. Indeed, at oral argument before the Connecticut Supreme Court, the Petitioner made this very analogy. Transcript of Connecticut Supreme Court argument. App. at A2.

The Connecticut Supreme Court, at the Respondent's insistence, conflated the two legal issues and supplanted the broad discretionary authority granted to pre-trial disqualification with a new "compelling need" test. The Petitioner, however, never agreed to this standard and argued from the correct standard.

The Court below decided to both depart from the accepted standard for disqualifying counsel that was presented to it and ruled that this case did not satisfy the heightened standard adopted. Thus, the issue of the proper standard was considered and resolved and affected the outcome in the case.

II. CAN THE ERRONEOUS DEPRIVATION OF COUNSEL OF CHOICE EVER BE HARMLESS?

The Respondent concedes that the issue of harmlessness has not been definitively ruled on by this Court. *Respondent's Brief in Opposition at 8-9.* His response provides some good reasons for granting review.

First, Respondent claims that the state did not discuss harmless error below. *Id. at 8.* In setting forth the standards for review, however, the Petitioner not only argued for broad discretion, but also cited *Flanagan v. United States, 465 U.S. 259, 269 (1984),* for the proposition that disqualification orders have to be reviewed after the trial is complete. Specifically, the Petitioner quoted that portion of *Flanagan* which states that part of the analysis includes "[t]he effect of the disqualification on the defense" and analogized this issue to speedy trial claims which

require proof of specific forms of prejudice.[4] *Id.*

The Respondent, however, never claimed that he was harmed, but rather that he was wronged and that harm should not be a factor. Thus, the Petitioner did not respond to a claim not raised. The Petitioner took the opportunity, however, to highlight for the Court below the evidence elicited at both this trial and the Brown/Clarke trial that positively linked the disclosure to the double-homicide.

At oral argument the Petitioner reiterated its claim that Mastronardi was a key witness, but even if there was a way to avoid having him testify the conflict that existed would "harm" the proceedings due to his link to the Respondent's crime. App. at A2-A6. In other words, the issue of harm arising from the conflict was a double-edged sword that is aligned along the two opposing Sixth Amendment rights–the right to counsel of choice and the right to conflict-free representation. The Petitioner illustrated that the conflict could have harmed the Respondent in a manner that some courts hold is *per se* reversible error, it could have prejudiced the Petitioner, and/or compromised the integrity of the criminal justice system. *Id.*

The Respondent also argues that the question left open in *Flanagan* should not be resolved in this case because the ruling below, eliminating a harmless error analysis, is an effective deterrent to prosecutorial misconduct. *Respondent's Brief in Opposition at 9, 11-12* (*per se* rule acts as a check on "an unscrupulous or overzealous prosecutor [who] might call defense counsel as a witness unnecessarily. or manufacture a conflict."). Although, in *Wheat*, this Court recognized that this is a valid

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[4] This language in *Flanagan* certainly suggests a harmless error analysis. Otherwise, the Court would have no reason to be concerned about how disqualification affected the defense.

concern, it left that issue to be resolved by the trial court exercising its broad discretion to decide whether counsel should be disqualified. *Wheat v. United States, 486 U.S. at 163.*

Thereafter, if, indeed, a defendant alleges prosecutorial misconduct, this Court favors Due Process as a vehicle for providing a remedy. *Banks v. Dretke, 2004 U.S. LEXIS 1621, 45-46 (2004).* Resolving a due process claim, however, requires proof of both misconduct and prejudice. *Id.* Thus, the specter of prosecutorial overreaching cannot exclude an analysis of harm without running afoul of this Court's jurisprudence on prosecutorial misconduct.

Finally, the Respondent states that "after Mastronardi's removal, the trial court appointed a less-experienced public defender to represent Peeler;" *Respondent's Brief in Opposition at 8-9. at 2;* and that "Mastronardi [was] a highly regarded criminal defense lawyer;" *Id. at 10.* Nothing in the record establishes which attorney was better qualified. Indeed, the record provides two insights into why the Respondent selected Mastronardi over another private attorney, Eugene Riccio, who represented him in the drive-by shooting case. The Respondent testified that he was told that Mastronardi was "just as good" as Riccio and offered him a more favorable payment plan. *Tr. 9/22/99 at 82-90.*

The only unique characteristic about Mastronardi's stature as defense counsel that finds support in this record is that, in an extremely high profile criminal event, the Respondent used him as a tool to plan a double homicide. Mastronardi was the only attorney in the entire State of Connecticut to carry that unwelcome burden.

CONCLUSION

Both of the questions are worthy of this Court's review because of the conflicting jurisprudence that has developed since *Wheat* and *Flanagan*. Moreover, the issues arise in a case that holds that the Sixth Amendment right to counsel of choice protects the Respondent's abuse of that right.

Respectfully submitted,

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APPENDIX

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Transcript Excerpt dated May 21, 2003 . . . . . A-1

* * * *

JUSTICE KATZ: What if–I'm looking at Mr. Benedict's argument in the course of this motion on A52 and he says: Perhaps the State can develop the information it wants to develop through some other avenue. That may well be. I don't know that, in fact, to be true at this time, but that doesn't mean the State would then be restricted and deprived of giving Mr. Mastronardi's evidence as well.

So, your argument is even if this could have been accomplished without Mr. Mastronardi, the State's entitled to do it its way.

MR. WELLER: No, Your Honor. That's not–what he says is looking perspectively. Your question is to look back retrospectively.

Perspectively, he's saying maybe. I don't know how the evidence is going to come in. I don't know what witnesses are going to testify to. I might be allowed to anyway.

Granted, he's making that argument but that's not why Mr. Mastronardi was disqualified. Judge Thim saw the connection as clear as day between what Mr. Mastronardi could provide that nobody else could, and, in fact, he was called as a witness, Your Honor.

JUSTICE KATZ: Well, I'm not sure how he saw it clear as day when I'm reading the argument and I've now got the benefit of 20-20 hindsight, so I guess I'm confused by your statement.

MR. WELLER: Well, read Judge Thim's decision. His two-line decision makes the connection. He connects the dots and turns out, with the benefit of 20-20 hindsight, that he was accurate, that Attorney Mastronardi was a witness.

He wasn't a witness in this case. They didn't go into great detail about the double homicide in this case, but this case

was only--they were joined after the disqualification, they were severed because of a Bruton issue; again, foreseeability.

Mr. Benedict didn't know about the Bruton issue until after the joinder, and after the joinder he brought it to the Trial Court's attention and the Bruton issue regarding the cases, the cases were separated, so, you know, as the cases go, and Mr. Mastronardi was on the State's witness list and was to be called as a witness.

From the State's position, this case is indistinct from Uhlman, utterly indistinct. It's the same premise of somebody using information gained from counsel for the purpose of going and eliminating a witness. Mr. Uhlman--it could have been the same type of stipulation in that case.

Maybe Mr. Uhlman wasn't willing to do it, but this Court ruled in Uhlman that he could be held in contempt for not answering the questions, that the State was entitled to extract that information from counsel despite the attorney-client relationship because it didn't touch on it.

If Mr. Uhlman can be held in contempt for that--Mr. Uhlman knew well enough to recuse himself. If he can be held in contempt for that when Mr. Mastronardi has the same information to offer, then he should be recused, and he was and it was proper exercise of the Court's discretion.

A lot of the questions that would go to--even looking back at it, Your Honor, Justice Katz, looking back on it, this case went down exactly the way it predicted, and Mr. Mastronardi's testimony was important in the scheme of things.

Maybe at the end of it when you look back and you say, gee, there's overwhelming evidence of guilt in both of these cases, but, certainly, you can't say that perspectively.

* * * *

*** MR. WELLER: But if they listened to the testimony of these people and after hearing that testimony they can confirm other aspects of it, the jury had a fair evaluation of who was at

risk here and who wasn't.

In the end, the defendant was not denied a fair trial. The defendant was given adequate counsel. He was given counsel under the proper circumstances.

If I can leave the Court with anything, it's that the understanding that the right to counsel is always trumped by the idea of the view of the system as being fair, and whenever counsel's participation compromises that, the right to counsel has to fall away, and that's what the Trial Court did here. It protected the integrity of the system.

Russell Peeler was not convicted in any case with a string of testimony that was crucially applied by an attorney who represented him at the time or was representing him in a trial, and that is the type of integrity that this Court should approve. It did so in Uhlman and it should do so again here.

This is a difficult case to try when witnesses are being killed one after the other.

These are very difficult cases to try, and to say, retrospectively, that, well, maybe the State could have gotten the evidence elsewhere is a fair question, but I think, when you're dealing with a trial court's discretion perspectively, the Court has to say yield to the trial court and yield to the system being run in a fair manner.

JUSTICE PALMER: Mr. Weller, I keep getting back to the stipulation. I just want to understand what your position is on that, clearly.

If Mastronardi had agreed to stipulate and he had, during a meeting with his client subsequent to his gaining permission to turn these over to his client, he had done that, he had visited his client and done that and that was the stipulation, nothing more, is it the State's view that it would have been improper for the Trial Court to have allowed that stipulation?

MR. WELLER: It would have been very dicey. It would

have been very dicey to draft the stipulation with the information that the State wanted, that the State wanted to pursue.

By the way, what the State learned, you know, as the testimony progressed in the second trial, it would have been a very dicey proposition. We'd probably be standing there arguing that now, and we'd be arguing a Crespo situation.

So, when you're talking about a trial court exercising its discretion, if it does it one way, it could be caught in a Crespo situation. If it does it the other way, it could violate counsel, the right to counsel.

That's where the trial court's discretion has to be yielded to, so if there would have been a stipulation, I think it would have--it's the State's opinion it would have been a very dicey proposition.

JUSTICE PALMER: I just don't understand why, exactly.

MR. WELLER: Because, Your Honor, you can't extract the attorney-client relationship from it.

Your Honor thinks--

JUSTICE PALMER: You can't extract--

MR. WELLER: --you can't extract the fact that this was a transaction between defendant and counsel.

JUSTICE PALMER: Well, if the stipulation said, I went to visit my client to meet with him and--

MR. WELLER: That's improper. The cases that talk about it say that the fact that the jury finds out that the information came by counsel who represents them, that's an impropriety. It's that very thing that makes it improper.

The stipulation cases talk about it was okay to stipulate when the stipulation could somehow say that a piece of evidence

arose without mentioning that counsel was involved in providing it.

JUSTICE PALMER: And a defendant cannot waive any difficulty with that.

MR. WELLER: No.

JUSTICE PALMER: The cases say that that kind of stipulation would so undermine public confidence in the system that we simply cannot permit it, and it trumps the right to counsel.

MR. WELLER: That, exactly, Your Honor.

At that point if that information is crucial and it's the only way to bring it out, then that's conflict-free representation that the defendant cannot waive and shouldn't be allowed to waive unless you want to set new standards.

JUSTICE PALMER: (Unclear)

MR. WELLER: And, Your Honor, by the way, when the stipulation occurred would also be important because the State needs the opportunity to know what it's going to ask Mr.
(transcript p. 32, 33)
Mastronardi.

I mean, it also asked Mr. Mastronardi whether, as a defense attorney, as Peeler's defense attorney, was this extraordinary to you?

Now, maybe that wasn't something that was crucial, but what would the State be willing to stipulate to that would be acceptable to it when it has the burden of proving guilt beyond a reasonable doubt?

That we don't know but if it was stipulating to what Your Honor expressly stated, from the case law that's been cited by

both parties that would have been improper.

If there's no further questions, Your Honors we'd ask that the convictions be affirmed. Thank you.